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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1480

FORREST GERRY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-1531

RICHARD PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 515 F.2d 130.

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[1] All "Pet. App." references are to the appendix in No. 74-1531.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1975. Petitioner Gerry filed a petition for a writ of certiorari on May 27, 1975, within the period of an extension of time granted by Mr. Justice Marshall on April 11, 1975. Petitioner Perry's petition for rehearing was denied on May 7, 1975; he filed his petition for certiorari on June 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain conduct of the government warrants reversal of petitioners' convictions.
2. Whether the trial court erred in failing to hold a formal hearing on the mental competency of a witness (Pet. No. 74-1531).
3. Whether the trial court erred in admitting testimony of a mathematician on the issue of betting patterns (*ibid.*).
4. Whether the reference to "made man," "bookmaker," and "fierce mob" denied petitioner Perry a fair trial (*ibid.*).

STATUTE INVOLVED

18 U.S.C. 224 reads in pertinent part:

> Bribery in sporting contests.
>
> (a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in com-

merce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

STATEMENT

Following an eleven-week jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of influencing the outcome of harness races by bribery (count 1) and of conspiring to do so (count 2), in violation of 18 U.S.C. 224 and 371.[2] Petitioner Gerry was sentenced to concurrent terms of four years' imprisonment. Petitioner Perry was sentenced to concurrent terms of two and one-half years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). Both petitioners were also fined $10,000 on each count.

1. The government's evidence is detailed in the court of appeals' opinion (Pet. App. 3a-7a). In brief, it showed that from January until April of 1973, Gerry, Perry, and others conspired to bribe New York harness race drivers to finish in specified positions, usually out of the money, in "superfecta"

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[2] The grand jury indicted 28 individuals. One was a fugitive at the time of trial (Michael Sherman); when subsequently arrested he pled guilty. Five others were severed prior to trial, one of whom (Seymour Rothstein) pled guilty during the trial. Six were dismissed during the trial, and fourteen were acquitted.

races.[3] After bribing certain drivers to hold their horses back, Gerry would bet large sums of money covering all possible combinations in which the remaining horses might finish (T. 136-142, 1089, 1186-1197, 1780-1781, 1924-1925, 2223-2235, 2520).[4] To place the bets, Gerry would relay the combinations to other gamblers, including petitioner Perry and co-defendant David Kraft,[5] who would place the bets themselves or through others (T. 1835, 1844, 2116, 2198-2199, 2238-2239, 3573-3574, 3588-3589, 3949, 4217-4219). Gerry also bought large numbers of superfecta tickets himself (T. 1924-1925, 1955, 2198-2199, 2223, 2370-2371). The gamblers would normally have others cash the winning tickets and sign the necessary Internal Revenue Service reporting forms provided by the racetrack (*e.g.*, T. 395-503, 3349-3350, 3477-3478). Gerry also got a portion of the winnings made by other gamblers (T. 4235, 4255). In the approximately three and one-half months of the conspiracy, Gerry was responsible for

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[3] A "superfecta" is a harness race in which the bettor, in order to win, must select the first four horses to finish, usually out of a field of eight (Pet. App. 3a-4a).

[4] As the court of appeals explained, with one or more horses out of contention for the first four positions, the number of possible combinations in which the remaining horses might finish was small enough that petitioners could bet on each combination and, given the amount paid by a winning ticket, assure themselves a sizable profit on every fixed race.

[5] Kraft pled guilty to sports bribery and testified as a government witness (T. 4278).

over $1,000,00 in bets, with gross winnings of over $2,000,000 (T. 1311, 1679).

FBI Agent Sean Hilly testified that he overheard a conversation between Gerry and Kraft in which Gerry said that he was paying off the drivers and had taken the precaution of not being seen with more than one driver at any one time (T. 1754-1757, 1780-1781). Kraft testified to similar admissions by Gerry (T. 4237, 4258-4259, 4315-4316, 4341-4342).

2. The theory of the defendants' case, both in their cross-examination and in their case-in-chief, was that their enormous profits were attributable not to bribery, but to Gerry's remarkable talents at handicapping (*e.g.*, T. 4056, 4650, 4988, 8042-8043, 8444-8447, 8453-8455). The defense attempted to show that just one or two drivers could not fix a race (*e.g.*, T. 233, 8755), and that, even if they could physically manage to do so, they would be detected by the racing industry's safeguards (*e.g.*, T. 8349-8350, 8440-8444, 8659). None of the defendants testified in his own defense.

ARGUMENT

1. Petitioners claim that tape recordings secretly made by a government witness at the behest of the defense reveal that the prosecution team was guilty of misconduct warranting dismissal of the indictment. An examination of the record refutes the claim.[6]

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[6] Petitioners' joint appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court, contains a transcription of the tapes at pages D1 to D219 (here-

On April 18, 19, and 21, 1974, while the trial of this case was in progress, several conservations that occurred in the Brooklyn field office of the Department of Justice Organized Crime Strike Force were surreptitiously recorded by Joseph Pullman, an indicted co-conspirator who was severed prior to trial when he agreed to plead guilty and testify for the government (Pet. App. 20a-21a). Pullman made the recordings at the request of petitioner Gerry's attorney (T. 5294-5295). On April 24, with the trial still in progress, the defense disclosed the existence of the tapes to the court.[7] The jury was excused and the tapes were played (T. 5345-5350). At their conclusion the court denied a defense motion for mistrial, finding the allegations of prosecutorial misconduct "overstated" (T. 5347, 5351). The court of appeals agreed that none of petitioners' claims in respect to the tapes warranted a mistrial.

a. Petitioners' assertion (Pet. No. 1480, at 11-12; Pet. No. 1531, at 25) that the government suborned the witness Kraft to commit perjury is wholly unsupported by the record.

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inafter cited accordingly). We are also lodging a copy of the government's brief on appeal (hereinafter cited as "App. Br."), wherein appears, in more readable form, transcripts of the conversations relevant to petitioners' claims (including, in an addendum, the transcription of one conversation that does not appear in petitioners' appellate appendix).

[7] Pullman was granted immunity on May 1 (T. 6392) and testified as a government witness on May 2 (T. 6443); at that time, however, he recanted the testimony he had given against petitioners at the grand jury and gave no testimony helpful to the prosecution.

On Friday afternoon, April 19, 1975, Pullman recorded the conversations that occurred in the office of prosecutor Michael Pollack (Pet. App. 21a). The atmosphere was hectic, with numerous people wandering in and out as they left for the weekend (ten different voices appear on the tapes). At one point, the subject of Kraft's testimony arose. He had testified earlier that afternoon; on cross-examination, defense counsel had sought to establish that Kraft had considered himself the victim of a "tout scheme" rather than a co-conspirator.[8] In Pollack's office, Kraft insisted that "[t]his ain't nobody's tout scheme" (App. D59) and pointed out, in Pullman's presence, that when Pullman had first approached him on the subject of the fixed races, Pullman had unerringly predicted the results of a subsequent superfecta (App. D66). Several moments later FBI Agent Fanning asked (App. D70-D71), "All right, do you think he was touting Richard Perry? and the Vario's? Do you think he was touting the Vario people?" The conversation briefly touched on Vario's notoriety,[9] switched to interviewing a potential wit-

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[8] The district court explained the meaning of a "tout scheme" in its jury charge (Pet. App. 11a, n. 12):

> The implication in the cross-examination of Mr. Kraft was that Mr. Gerry was a con artist, who induced his betting clients to pay him money that he represented to be bribes but that he never actually bribed anybody and just put the money in his own pocket.

[9] Paul Vario of Brooklyn had been the subject of publicity in connection with investigations by state law enforcement officials into organized crime. His son, Peter Vario, was a co-defendant in this case.

ness then in Florida (App. D71), and then returned to the government's statistical evidence that petitioner Gerry's winnings were not the result of accident or talented handicapping.

It is on Agent Fanning's brief and passing remarks that petitioners base their claim that the government suborned perjury by telling Kraft how to testify on redirect examination in contradiction of petitioners' "tout scheme" defense. But a full reading of the transcript of the recordings of the April 19 conversations makes clear, as both the district court (T. 5352) and the court of appeals (Pet. App. 22a) found, that the government was not suborning perjury; rather, in preparing a witness for further trial proceedings, the government was merely attempting to learn the reasons why Kraft himself did not believe the "tout scheme" theory.

Furthermore, petitioners were in possession of the April 19 recordings when Kraft testified on redirect examination. Yet they did not, as they might have if the recordings demonstrated subornation of perjury, disclose the existence of the tapes in an attempt to impeach Kraft on recross examination. Nor did they recall Kraft after the existence of the tapes had been disclosed.[10]

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[10] After the tapes were revealed, the defendants sought to recall Kraft while the government's case was still being presented. The district court declined to allow the government's presentation to be interrupted, but stated that defendants could, of course, call Kraft during their case (T. 8248). This petitioners chose not to do.

In short, taken in context, Agent Fanning's remarks provide no foundation for the accusation that the government suborned the perjury of a witness.

b. Petitioner Perry (Pet. No. 74-1531, at 25) also accuses prosecutor Pollack of lying to the court in reference to his recollection of the Friday discussion with Kraft. This accusation likewise has no substance; in response to it we rely upon the ruling of the court of appeals on the issue (Pet. App. 22a): [11]

> We also find no merit in the allegation that the prosecutor, Michael Pollack, deliberately lied to the court as to the date on which he discussed with Kraft possible avenues of rehabilitation. Pollack admitted that he had spoken to Kraft on Friday, April 19, 1974, but that the meeting was chaotic and he did not receive a satisfactory response until Monday, April 22, 1974. Pollack volunteered that "for me, Friday through Monday is one day." While the tapes show a more extended Friday conversation between Pollack and Kraft than Pollack's statements may have led one to expect, Pollack was correct in stating that there were many other people milling about and that the meeting was rather chaotic. Further, there is no reason for Pollack to have misled the court as to whether he spoke to Kraft on Friday or Monday as it was clearly a collateral issue of no significance.

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[11] Even if Pollack had lied about the date upon which he had talked with Kraft, we fail to see any prejudice to petitioner Perry in result.

c. Petitioners also claim (Pet. No. 74-1480, at 11; Pet. No. 74-1531, at 23) that their convictions should be reversed because the government induced Pullman to testify by promising him that, due to prosecutor Pollack's influence over the district court, he would not be sentenced to imprisonment on his plea of guilty.

Certain government conduct in this respect was less than exemplary, but petitioners have again painted the scene darker than a full reading of the transcript warrants. Moreover, petitioners have not shown that anything done by the government prejudiced them or should lead to a reversal of their convictions for any other reason.

The statements to which petitioners refer occurred while the government was attempting to prepare Pullman, a recalcitrant witness, for trial by refreshing his recollection with his previous statements before the grand jury and to F.B.I. agents. It is evident from a reading of the transcripts that Pullman by that time was acting wholly on behalf of the defendants. He persistently sought reassurance that the government's recommendation on sentencing would have an influence on the district court, and he asked a series of leading questions designed to elicit damaging responses from the F.B.I. agents and the prosecutors. That he achieved some success is regrettable, but the government's conduct in this respect was not so discreditable as petitioners would have it. Agent Fanning told Pullman that promises could not be made to him (App. Br. 24, 29); Agent Walsh said

the same (App. Br. 26); prosecutor Pollack said that he could make no guarantees (App. Br. A5, 29) and that the district court would not invariably follow his recommendations on sentencing (App. Br. 32).

In any event, the court of appeals correctly ruled, after "a full reading of the transcripts" (Pet. App. 23a), that the district court was not obliged, on the basis of the statements of the government agents and prosecutors, to declare a mistrial or dismiss the indictment (Pet. App. 24a). Petitioners can point to no prejudice suffered by them as a result of the government's representations to Pullman: nearly all of the statements made were in response to his staged requests for reassurance and, in any event, when called to testify he recanted his grand jury testimony and gave no evidence helpful to the prosecution. Finally, this case presents no issue of persistent governmental disregard of constitutional rights, and *Mapp* v. *Ohio*, 367 U.S. 643, cited by petitioner Gerry (Pet. No. 74-1480, at 13) in support of the argument that this Court should reverse the convictions in this case in the exercise of its supervisory powers, is wholly inapposite.

2. Petitioner Perry also contends (Pet. No. 74-1531, at 14-17) that the trial court should have held a formal hearing to consider the mental competency of a government witness. On the morning of April 8, defense counsel requested a hearing on the competency of Bruce Cussell, a government witness, before Cussell testified. The court replied that it would consider the request. The prosecutor said that he

had received a letter that morning from a doctor indicating that the witness was competent to testify (T. 2407-2408). That afternoon counsel for Perry stated (T. 2600):

> I would like to ask your Honor when I could have a psychiatrist here tomorrow in connection with the voir dire examination as to the competence and sanity of a witness by the name of Bruce Cussell.

The Court responded: "Have him here at two o'clock" (Tr. 2600).

The following morning the government supplied the defense with a copy of the letter previously referred to (Gov. Exh. 413), from one Dr. Parlade, indicating that Cussell had no memory impairment and that his "mental condition would not in any way effect [*sic*] his testimony" (T. 2601-2608). Perry did not, however, supply a psychiatrist, nor indeed did he ever broach the subject of a hearing on Cussell's competency again.

On April 15, Cussell testified on direct examination without objection (T. 3567). In the middle of cross-examination, the defense moved that Cussell be disqualified "on the grounds of mental incompetence" (T. 3765), but the court found the witness competent and denied the motion (T. 3766-3768). The next morning the court reiterated that the witness was competent to testify and that the defense objections went to credibility rather than competency (T. 4029-4030):

> I think the attack on mental competence was pretty well wiped out by the subsequent defense counsel who cross examined and got quite comprehensible and intelligent, whether credible or not, answers to their questions on cross-examination.

On this record the claim that the court erred in failing to hold a formal competency hearing has no substance. As the court of appeals ruled (Pet. App. 9a) and as petitioner Perry concedes (Pet. No. 74-1531, at 15), the form of the inquiry into the competency of a witness is a matter for the district court's discretion. Here, opportunity was offered the defense to present psychiatric testimony on the issue, yet no such evidence was produced. The only medical opinion offered was that Cussell was competent to testify, and the district court's ruling on competency came after the court had observed him on both direct and cross examination. Petitioner does not challenge the court of appeals' ruling (Pet. App. 10a) that the district court's finding of Cussell's competency as a witness was not clearly erroneous. *A fortiori*, it was not error for the district court to fail to hold a hearing on competency.

3. Petitioner Perry also urges (Pet. No. 74-1531, at 22-23) that the district court erred in admitting the testimony of a mathematician to counter the defense theory that the $2¼ million winnings in a three or four month period were the result of Gerry's handicapping skills. This claim was properly re-

jected by the court below, on whose opinion we rely (Pet. App. 19a-20a):

> While there may have been an overkill in the mathematical, statistical, and graphic evidence introduced in this case, certainly sufficient evidence of actual bribery was adduced to refute the contention that the jury verdict was based on mathematical probabilities and not on actual evidence of bribery. In any event, this testimony was introduced for purposes of meeting defendants' argument that Gerry's apparent success was attributable to his handicapping skills and the judge gave appropriate cautionary instructions to remind the jury that Gerry's skills as a handicapper reflected his special knowledge of the field and not simply a mechanical application of a rule excluding horses bearing the longest odds.

4. Petitioner Perry contends (Pet. No. 74-1531, at 18) that references to his connection with organized crime denied him due process of law.

During the cross-examination of government witness Kraft, the defense had attempted to establish that Gerry was engaged in a "tout scheme" rather than sports bribery and that Kraft's testimony was a recent fabrication. To rebut these claims the government on redirect asked Kraft whether, at the time, he had believed that he was involved in a "tout scheme"; Kraft replied that he had not, because too many horses were finishing in the order predicted and because Pullman had informed him that Gerry was also betting with Perry, "who is connected with

a fierce mob in Brooklyn * * * and I felt that Mr. Gerry would not want to play tout schemes with people like that" (T. 4925-4929). Both immediately before and after this testimony the court instructed the jury that it was admissible only as to Kraft's state of mind (T. 4926) and "is not to be taken as evidence that anyone belongs to any mob" (T. 4930).

Subsequently Pullman testified and related his grand jury testimony. In attempting to refresh his recollection, the government asked him about statements he had made to FBI agents. In one of them he had referred to "Richie" as "the son of a made man in Brooklyn" (T. 6853). Pullman denied having made such a statement and said that he did not know the meaning of the term "made man" (T. 6853-6854).

Marvin Proman, a groom and trainer, also recanted his grand jury testimony and was subsequently questioned by the government about his prior statements to the FBI, in one of which he had referred to Perry as a "bookmaker." Proman testified that he did not "recall saying that" (T. 1830).

Contrary to petitioner's claim, these three isolated references, in the course of an eleven-week trial filling 11,000 pages of transcript, did not allow the government to establish his "guilt through his reputed association with * * * the 'Mafia'" (Pet. No. 74-1531, at 18). The expression "made man" is obscure and the term "bookmaker," as the court of appeals noted (Pet. App. 13a), has no inherent organized crime connotation. As to Kraft's mention of

a "fierce mob," and the cumulative effect of these isolated references, we submit that the court of appeals was correct in ruling as follows (Pet. App. 13a-14a):

> [I]n light of the attempt on cross-examination to show that Kraft was being victimized by a "tout" scheme, the elicitation of the two reasons why Kraft did not believe it was a "tout" scheme appears to have been a reasonable and permissible response by the government. Again, the trial court immediately gave the proper limiting instruction that the testimony was to be considered only as it related to Kraft's state of mind, not as evidence that any of the defendants was a member of any mob. Thus each of the three contested references was properly admitted. We fail to see how any one of them standing alone or all three taken together deprived the appellants of a fair trial.[12]

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[12] In an attempt to show that he was prejudiced by these references to organized crime, petitioner Perry asserts that "some of the jurors" informed his attorney after trial that "Perry was convicted only because they thought that he was an enforcer for the mob" (Pet. No. 74-1531, at 21). Petitioner made such a claim to the district court in a post-trial motion for acquittal. It was then, as now, unaccompanied by an affidavit from any juror, or any other evidence that would lend substance to this claim. The district court denied the motion from the bench, and petitioner advances no reason why the district court's ruling was in error. Furthermore, both before the district court and in the court of appeals, petitioner's claim was that "one of the jurors" (see petitioner Perry's brief on appeal, at 39) had said that his conviction was assertedly tainted, whereas now the claim has risen to "some * * * jurors." Given petitioner's complete failure to substantiate it, we submit that this claim is entitled to no weight.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1975.

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